

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR08-306

JOHNNY ELMO MORGAN
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE

Opinion Delivered November 5, 2008

APPEAL FROM THE SCOTT
COUNTY CIRCUIT COURT
[NO. CR2007-33A]

HONORABLE DEWELL FRANKLIN
AREY, III, JUDGE

REVERSED AND DISMISSED

JOSEPHINE LINKER HART, Judge

A jury found appellant, Johnny Elmo Morgan, guilty of manufacturing methamphetamine, possession of drug paraphernalia with the intent to manufacture methamphetamine, and first-degree endangering the welfare of a minor. His sentence was also enhanced after the jury found that he manufactured methamphetamine, or possessed drug paraphernalia with the intent to manufacture methamphetamine, in the presence of a minor. Appellant argues on appeal that the evidence was insufficient to support the convictions. We agree and reverse and dismiss the convictions.¹

Our criminal statutes provide that it is unlawful for any person to manufacture methamphetamine. Ark. Code Ann. § 5-64-401(a)(1) (Supp. 2007). Furthermore, “[i]t is

¹Appellant also argues that evidence seized should be suppressed because of deficiencies in the search-warrant affidavit. Given that we find the evidence insufficient to support his convictions, we need not address that point.

unlawful for any person to use, or to possess with intent to use, drug paraphernalia to manufacture methamphetamine.” Ark. Code Ann. § 5-64-403(c)(5) (Supp. 2007). And the sentence of any person who is found guilty of manufacture of methamphetamine, or possession of drug paraphernalia with the intent to manufacture methamphetamine, may be enhanced under certain circumstances involving the presence of a minor. Ark. Code Ann. § 5-64-407(a) (Supp. 2007). Finally, a person commits the offense of first-degree endangering the welfare of a minor if, “being a parent . . . he or she purposely . . . [e]ngages in conduct creating a substantial risk of death or serious physical injury to a minor.” Ark. Code Ann. § 5-27-205(a)(1) (Repl. 2006).

At trial, Heath Tate, an employee of the Fifteenth Judicial District Drug Task Force, testified that on March 8, 2007, he executed a search warrant at the residence of appellant and Amy Smith. When the warrant was executed, appellant was not present, but Smith and another woman were standing outside the single-wide mobile home. Two children, both of whom were appellant’s, and a fifteen- or sixteen-year-old juvenile were inside the residence. Another juvenile ran out of the back of the residence. Two other children who were appellant’s later arrived on a school bus. Tate testified that there was an unlocked metal outbuilding approximately thirty to forty feet behind the trailer, as well as a “semi-trailer box.” Tate testified that he acted as the evidence custodian, and his evidence log set forth the items found in the residence and the outbuilding. According to his evidence log, in the north bedroom of the residence they found a glass smoking pipe, one plastic bag, three corners of plastic baggies, and a plastic bag containing a white powder substance. Also according to the

evidence log, in the kitchen on top of the refrigerator, police found two light bulbs, a rolled dollar bill, a straw, and a roll of plastic bags. He testified that the pipe could be used for smoking methamphetamine, that a controlled substance can be wrapped in a plastic bag corner, and that the light bulb had been hollowed out and that it could be used to smoke methamphetamine. Both light bulbs had discoloring. He also noted that plastic bags could be used for delivery of methamphetamine and that the corners could be taken out of the bags.

Also according to the evidence log, in the outbuilding police found a camp stove, an “active HCL generator,” two one-gallon containers of muriatic acid, a one-gallon container of lighter fluid that was one-half full, coffee filters, two glass containers, a paper towel with red residue, a glass container holding one pound of salt, two glass containers holding unknown liquids, two empty charcoal starter containers, an empty salt package, plastic tubing, “ten generators made of plastic 20 oz. bottles,” a “green metal ammo can containing numerous matches,” and a plastic cardboard box containing seven pints of hydrogen peroxide. Tate testified that the active HCL generator, which had a tube coming out of it, was used in the manufacture of methamphetamine. Though listed as part of the items found in the outbuilding, he stated that the ten, twenty-ounce plastic soda bottles were all found “outside the metal building just laying around the yard” and that the bottles were between the residence and the building. Tate testified that they were HCL generators because some of them contained salt. Tate also testified the matches did not have striker plates.

Another officer, Joey Deer of the Scott County Sheriff's Office, also assisted in the search. Deer testified that they obtained a search warrant of the residence because a confidential

informant had purchased methamphetamine at the residence on two occasions. Deer testified that the two purchases had been made within forty-eight hours before the search and that the confidential informant told them that Amy Smith made the sales. He testified that there was a metal outbuilding, a trailer for an eighteen wheeler, an old swimming pool, thirty or forty salvage vehicles, and other buildings. He also admitted that the back yard “was grown up.” He further testified that there was not a fence between the residence and the outbuilding.

Phillip Johnston, a forensic chemist with the Arkansas State Crime Laboratory, testified that the burned residue in the pipe was methamphetamine and dimethyl sulfone, which is a common cutting agent that is combined with a drug to increase the weight of the drug. The white powder in the plastic bag was 0.2199 grams of dimethyl sulfone. He also tested residue in the light bulb and the straw, and found it also was methamphetamine and dimethyl sulfone residue. He also found methamphetamine, phosphorus, and iodine residue on the stained paper towel and concluded that this was evidence of manufacturing methamphetamine. The unknown liquids did not contain any controlled substance, but one liquid was acid, and acid is used in the manufacture of methamphetamine. He further testified that an HCL generator is a plastic bottle with salt and sulfuric acid mixed in the bottom. A hole is made in the cap of the bottle, a tube is inserted, and gas exits the bottle from the tube. He testified that the plastic bottle with tubing, which was found in the outbuilding, might indicate the manufacture of methamphetamine. He also testified that a gas stove can be used in the manufacture of methamphetamine and that lighter fluid, muriatic acid, phosphorus, plastic tubing, charcoal fluid, salt, hydrogen peroxide, and iodine are used in the manufacture of

methamphetamine. On cross-examination, Johnston testified that he did not know when the manufacturing process took place and that he could not determine how long ago someone used the HCL generator with the tube coming out of it.

Larry Garner, an agent for the Fifteenth Judicial District Drug Task Force, testified that upon investigation, he concluded that, due to the materials present, it was a methamphetamine lab. He concluded that the ten HCL generators were old and inactive and that the one with a hose in it was still active. He said each one would indicate a separate manufacturing process. Keith Vanravensway of the Scott County Sheriff's Office testified that he also participated in the search and that he found the HCL generators scattered all over the back yard in a twenty-five- to fifty-yard radius.

On appeal, appellant asserts that the evidence presented at trial was insufficient to support the convictions and the enhancement. He argues that there was no evidence from any witness who claimed to have seen or knew of appellant manufacturing methamphetamine, that the case consisted entirely of the circumstantial evidence of the items seized, and that the circumstantial evidence was insufficient to support the convictions. He notes that the HCL generators were old and not tested to confirm that they were HCL generators, that "no fingerprint testing was done on any of the items seized from the yard and outbuilding, which was unlocked and open to anyone, to demonstrate any connection between [appellant] and the seized items," and that none of the State's witnesses could testify as to when there had been a manufacture of methamphetamine. In response, the State contends that proof of constructive possession is sufficient to convict and that exclusive possession is not necessary

to sustain a charge if the place where the contraband was found was under the dominion and control of the accused.²

When the sufficiency of the evidence is challenged, the appellate court considers only the evidence supporting the guilty verdict, and the test is whether there is substantial evidence to support the verdict. *Gwatney v. State*, 75 Ark. App. 331, 57 S.W.3d 247 (2001). Substantial evidence is evidence of such certainty and precision as to compel a conclusion one way or another. *Id.* There is no distinction between circumstantial and direct evidence in a review of the sufficiency of the evidence, but for circumstantial evidence to be sufficient, it must exclude every other reasonable hypothesis consistent with innocence. *Id.*

We observe that the State need not prove that the accused had actual physical possession of the contraband; rather, constructive possession, which is control or right to control the contraband, is sufficient. *Franklin v. State*, 60 Ark. App. 198, 962 S.W.2d 370 (1998). Constructive possession can be inferred when the contraband is found in a place immediately and exclusively accessible to the defendant and subject to his control or when the contraband is in the joint control of the accused and another. *Id.* Joint occupancy alone, however, is not sufficient to establish possession or joint possession; there must be some additional factor linking the accused to the contraband. *Id.* In such cases, the State must prove

²The State also argues that appellant's challenge to the sufficiency of the evidence is not preserved for appellate review because he failed to renew his directed verdict at the close of all the evidence. Appellant offered no evidence in his defense, and therefore, he did not need to renew his motion for a directed verdict to preserve this earlier sufficiency argument. *Bell v. State*, 371 Ark. 375, ___ S.W.3d ___ (2007).

that the accused exercised care, control, and management over the contraband and that the accused knew the matter possessed was contraband. *Id.*

This case bears some resemblance to *Franklin*, where this court reversed and dismissed a charge of possession of a controlled substance with the intent to deliver. There, at the time of the search of the residence, two people were present, cocaine was found hidden under a dog house in the back yard, and in the residence an off-white, rock-like substance was found hidden under a piece of carpet in a bedroom. The defendant was found asleep in another bedroom and no drugs were found on his person. Also, on a date prior to the search, a narcotics purchase had been made from the residence, but the officer could not testify that the defendant was involved. The *Franklin* court held that the State failed to prove that the defendant constructively possessed the contraband, as the evidence fell short of demonstrating defendant's connection to the contraband or knowledge of its presence.

We likewise conclude that the evidence was insufficient to support the convictions. We cannot infer appellant's constructive possession of the methamphetamine lab found in the outbuilding. He was not present at the time of the search, and while contraband was found in an outbuilding only thirty to forty feet away from the residence, there was no testimony that he owned or rented the outbuilding, or that he was ever in the outbuilding. Thus, we cannot say that the contraband found in the outbuilding was in a place immediately and exclusively accessible to the defendant and subject to his control or in the joint control of the appellant and another. Furthermore, while the HCL generators were scattered in the back yard, there is no indication that they were exclusively accessible to appellant. Moreover, there

was no additional factor linking appellant to the HCL generators, which were described by the State's witnesses as "old" bottles and in a yard that was "grown up." We acknowledge that there were items found in the residence, and one might attempt to connect appellant with these items and argue that those items connect him to the outbuilding. But there again, there was no additional factor linking appellant to the items. We do not know if any of the items were in plain view or if any of the items were found in his bedroom. Moreover, there is no evidence that appellant was even selling the methamphetamine. The State's witness's hearsay testimony was that it was Amy Smith who was making the sales. This case turns on circumstantial evidence, and we cannot say that the evidence excludes every other reasonable hypothesis consistent with innocence.

Reversed and dismissed.

HEFFLEY, J., agrees.

GLADWIN, J., concurs.